Robinder Singh Jaj a/l Bijir Singh v Jasminder Kaur a/p Bhajan Singh

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO N-02(IM)-1168–06 OF 2022
ABDUL KARIM, SEE MEE CHUN AND COLLIN LAWRENCE SEQUERAH JJCA
19 SEPTEMBER 2023

Civil Procedure — Setting aside — Application for — High Court struck out appellant's application to set aside ex parte order in encl 20 that was filed in English — Whether encl 20 to set aside ex parte order granted could be struck out on ground of non-compliance of filing cause papers in Bahasa Malaysia — Rules of Court 2012 O 92 r 1

The appellant husband ('husband') and the respondent wife ('wife') were judicially separated pursuant to a petition for judicial separation filed by the wife. They have a child ('the child') from the marriage. Enclosure 6 was filed by the wife for an ex parte order for various reliefs. It was allowed in part where an ex parte injunction was granted to prohibit the husband from removing the child from Peninsular Malaysia; and molesting and/or harassing the wife. Enclosure 20 was then filed in English by the husband to set aside the ex parte order. Enclosure 26 was next filed by the husband for inter alia sole guardianship, custody, care and control of the child with supervised access to the wife. There was a consent order recorded. Thereafter, the husband then sought for encl 20 to be heard whereupon the High Court ('HC') struck it out. The HC took cognisance of O 92 r 1(1) and (4) of the Rules of Court 2012 ('the RC 2012') on the requirement of documents to be in the national language and the situations where proceedings may be commenced or conducted partly in the English language. Hence, this appeal. The issue for determination was whether encl 20 to set aside the ex parte order granted could be struck out on the ground of non-compliance of filing the cause papers in Bahasa Malaysia when the Registrar's Circular No 5 of 1990 ('the registrar's circular') allowed for cause papers relating to the Divorce and Matrimonial Proceedings Rules 1980 to be filed in English until such Rules was translated and *gazetted*.

Held, dismissing the appeal with no order as to costs:

(1) Order 92 r 1(1) of the RC 2012 was clear that any documents for use in pursuance of RC 2012 shall be in the national language. The submission

that the registrar's circular meant that cause papers for matrimonial proceedings could be filed in English as the Bahasa Malaysia translation of the Divorce and Matrimonial Proceedings Rules 1980 had yet to be *gazetted* was without merit as the registrar's circular was at best administrative in nature. The registrar's circular could not depart from the language requirement as clearly stated in O 92 r 1(1) of the RC 2012. As the registrar's circular was administrative in nature, it could not possibly prevail over O 92 r 1(1) of the RC 2012 which required court documents to be in the national language. The HC was not plainly wrong in striking out encl 20 (see paras 16, 20–21, 23 & 27).

[Bahasa Malaysia summary

Perayu suami ('suami') dan responden isteri ('isteri') telah berpisah dari segi kehakiman menurut petisyen perpisahan kehakiman yang difailkan oleh isteri. Mereka mempunyai seorang anak ('anak') daripada perkahwinan itu. Lampiran 6 difailkan oleh isteri untuk perintah ex parte untuk pelbagai relif. Ia dibenarkan sebahagiannya di mana injunksi ex parte telah diberikan untuk melarang suami daripada membawa anak dari Semenanjung Malaysia; dan mencabul dan/atau mengganggu isteri. Lampiran 20 kemudiannya difailkan dalam bahasa Inggeris oleh suami untuk mengetepikan perintah ex parte. Lampiran 26 seterusnya difailkan oleh suami untuk antara lain pemeliharaan, penjagaan dan kawalan tunggal kanak-kanak dengan akses berselia kepada isteri. Terdapat perintah persetujuan direkodkan. Selepas itu, suami kemudiannya memohon agar lampiran 20 didengar dan Mahkamah Tinggi ('MT') membatalkannya. MT mengambil perhatian dengan A 92 k 1(1) dan (4) Kaedah-Kaedah Mahkamah 2012 ('KKM 2012') mengenai keperluan dokumen dalam bahasa kebangsaan dan situasi di mana prosiding boleh dimulakan atau dijalankan sebahagiannya dalam bahasa Inggeris. Oleh itu, rayuan ini. Isu untuk penentuan ialah sama ada lampiran 20 untuk mengenepikan perintah ex parte yang diberikan boleh dibatalkan atas alasan ketidakpatuhan memfailkan kertas kausa dalam Bahasa Malaysia apabila Pekeliling Pendaftar Bilangan 5 Tahun 1990 ('pekeliling pendaftar') membenarkan bagi kertas kausa yang berkaitan dengan Kaedah-Kaedah Prosiding Perceraian dan Hal-Ehwal Perkahwinan 1980 difailkan dalam Bahasa Inggeris sehingga Kaedah-Kaedah tersebut diterjemahkan dan diwartakan.

Diputuskan, menolak rayuan tanpa perintah kos:

(1) Aturan 92 k 1(1) KKM 2012 adalah jelas bahawa sebarang dokumen untuk digunakan menurut KKM 2012 hendaklah dalam bahasa kebangsaan. Hujahan bahawa pekeliling pendaftar bermaksud bahawa kertas kausa untuk prosiding perkahwinan boleh difailkan dalam bahasa Inggeris kerana terjemahan Bahasa Malaysia Kaedah-Kaedah Prosiding Perceraian dan Hal-Ehwal Perkahwinan 1980 masih belum diwartakan

adalah tanpa merit kerana pekeliling pendaftar itu hanyalah bersifat pentadbiran. Pekeliling pendaftar tidak boleh menyimpang daripada keperluan bahasa seperti yang dinyatakan dengan jelas dalam A 92 k 1(1) KKM 2012. Oleh kerana pekeliling pendaftar bersifat pentadbiran, ia tidak mungkin mengatasi A 92 k 1(1) KKM 2012 yang memerlukan dokumen mahkamah dalam bahasa kebangsaan. MT tidak salah dalam membatalkan lampiran 20 (lihat perenggan 16, 20–21, 23 & 27).]

Cases referred to

Dato' Seri Anwar bin Ibrahim v Tun Dr Mahathir bin Mohamad [2010] 2 MLJ 41, CA (refd)

Lau Keen Fai v Lim Ban Kay @ Lim Chiam Boon & Anor [2012] 2 MLJ 8, FC (distd)

Megat Najmuddin bin Dato Seri (Dr) Megat Khas v Bank Bumiputra (M) Bhd [2002] 1 MLJ 385, FC (refd)

Ooi Bee Tat v Tan Ah Chim & Sons Sdn Bhd & Anor and another appeal [1995] 3 MLJ 465, SC (refd)

Zainun bte Hj Dahan lwn Rakyat Merchant Bankers Bhd & satu lagi [1998] 1 MLJ 532, HC (refd)

Legislation referred to

Divorce and Matrimonial Proceedings Rules 1980 r 3
Interpretation Acts 1948 and 1967 s 3
Rules of Court 2012 O 92 r 1(1), (4), O 94 r 3(3)

Appeal from: Petition for Judicial Separation No NA-33–3–01 of 2022 (High Court, Seremban)

Honey Tan Aly Ean (with Tay Kit Hoo) (Seira & Sharizad) for the appellant.
Harpal Singh Grewal (with Shailender Bhar and Chai Jia Yi) (Raihan & Shai) for the respondent.

See Mee Chun JCA (delivering judgment of the court):

INTRODUCTION AND PARTIES

[1] The appellant husband ('husband') and the respondent wife ('wife') are judicially separated pursuant to a petition for judicial separation filed by the wife. They have a child ('child') from the marriage.

PROCEEDINGS IN THE HIGH COURT

[2] There have been various proceedings filed in the High Court, relevant to the appeal, which we set down below.

[3] Enclosure 6 was filed on 7 January 2022 by the wife for an ex parte order for various reliefs. It was allowed in part on 24 January 2022 where an ex parte injunction was granted to prohibit the husband from removing the child from Peninsular Malaysia; and molesting and/or harassing the wife. Refer to the court order in encl 4/127–130 where the relevant part is reproduced as follows:

> ADALAH DIPERINTAHKAN DAN DIARAHKAN bahawa Responden oleh dirinya sendiri, pekerjanya atau ejennya atau sebagainya dihalang dan suatu injuksi adalah dengan ini diberikan menahannya daripada:-
>
> (a) Membawa Anak tersebut keluar dari Semenanjung Malaysia tanpa kebenaran bertulis daripada Pempetisyen ataupun perintah Mahkamah sehingga pelupusan petisyen ini;
>
> (b) Menyerang, mencabul, menjengkelkan atau menggangu Pempetisyen;
>
> (c) Satu pengurusan kes permohonan inter-partes bagi relif-relif dan injunksi secara interim sementara pelupusan petisyen ditetapkan pada 21 Februari 2022 dan arahan-arahan yang sewajarnya akan diberikan untuk pendengaran inter-partes; dan
>
> (d) Perintah interim akan terbatal dengan sendiri dan perlu didengar bersama-sama permohonan inter-partes sekiranya gagal membuat serahan ke atas Responden dalam tempoh masa 21 hari dari tarikh perintah ini.

[4] Enclosure 20 was then filed in English on 24 March 2022 by the husband to set aside the ex parte order. The application sought the following:

> 1. that the Order granted ex parte by this Honourable Court on 24 January 2022 (Enclosure 14) be set aside;
>
> 2. that the Petitioner be ordered to pay damages of RM1,000 per day or such sums as this Honourable Court deems fit (the Damages) from 24 January 2022 until Enclosure 14 is set aside;
>
> 2.1. the Petitioner shall pay the Damages to the Respondent within 7 days of the service of the order on the Petitioner and/or the Petitioner's firm of solicitors;
>
> 3. that the Petitioner be ordered to pay costs to the Respondent within 7 days of the service of the order on the Petitioner and/or the Petitioner's firm of solicitors;

[5] The grounds in support of encl 20 are as follows:

> (a) There was no urgency and/or merit to necessitate an ex parte application in the filing of the notice of Application dated 7 January 2022 (Enclosure 6) and/or the granting of Enclosure 14.
>
> (b) The Petitioner failed to give full and frank disclosure on material facts.
>
> (c) The Petitioner did not comply with Order 29, Rule 1 and Order 41 Rule 1(4) of the Rules of Court (the ROC).

(d) The Respondent did not comply with Rules 61(1) and 91 of the Divorce and Matrimonial Proceedings Rules 1980 (the DMPR).

(e) The Petitioner has suffered damages and incurred costs as a result of the granting of Enclosure 14.

[6] Enclosure 26 was next filed by the husband on 18 April 2022 for, inter alia, sole guardianship, custody, care and control of the child with supervised access to the wife. There was a consent order recorded.

[7] Thereafter, the husband then sought for encl 20 to be heard whereupon the HC struck it out. The notes of proceedings for 22 June 2022 (encl 4/5) has the following minutes:

> MINIT:
>
> Arahan amalan bil 8 th 2014 O 92 r 1(4) not complied supposed to file BM version within 2 weeks
>
> Method of Disposal: SO-Dibatalkan
>
> KEPUTUSAN
>
> MAH: SO LAMP 20

[8] Hence, the appeal by the husband.

DECISION OF THE HC

[9] The grounds of judgment of the HC (GOJ) are in encl 10/13–23.

[10] The HC took cognizance of O 92 r 1(1) and (4) of the Rules of Court 2012 ('the RC 2012') on the requirement of documents to be in the national language and the situations where proceedings may be commenced or conducted partly in the English language in particular where copies of such documents in the national language shall be filed within two weeks (paras 12 and 13, GOJ). The HC was mindful of the Registrar's Circular as evident in para 15 of GOJ. Nevertheless, the HC found as follows in para 16:

> 16. Namun demikian, keputusan mahkamah ini untuk menolak lamp 20 bukan disebabkan ianya difailkan di dalam Bahasa Inggeris, namun atas sebab bahawa tiada terjemahan difailkan dalam tempoh dua minggu atau apa-apa tempoh lanjutan yang dibenarkan oleh mahkamah ini. Jika dilihat kepada pemfailan lamp 20 tersebut, ianya difailkan pada 24 Mac 2022 dan hanya didengar pada 22 June 2022. Peguamcara Responden mempunyai masa hampir tiga bulan untuk memfailkan terjemahan bagi lamp 20 dan segala dokumen berkaitan sebelum ianya didengar. Namun, peguamcara responden telah gagal berbuat demikian, dan tiada pemohonan pelanjutan masa dipohon daripada mahkamah ini.

[11] The importance of Bahasa Malaysia in court proceedings as per *Dato' Seri Anwar bin Ibrahim v Tun Dr Mahathir bin Mohamad* [2010] 2 MLJ 41 and *Zainun bte Hj Dahan lwn Rakyat Merchant Bankers Bhd & satu lagi* [1998] 1 MLJ 532 were noted in paras 19 and 20.

THE APPEAL

[12] Before us, the appeal centred on the issue whether encl 20 to set aside the ex parte order granted on 24 January 2022 could be struck out on the ground of non-compliance of filing the cause papers in Bahasa Malaysia when the Registrar's Circular No 5 1990 (the Registrar's Circular) allows for cause papers relating to the Divorce and Matrimonial Proceedings Rules 1980 to be filed in English until such Rules is translated and *gazetted*.

OUR DECISION

[13] We do not intend to set out the respective submissions of the parties separately, but will where necessary, address them in the course of the decision.

[14] We note that from para 16 of the HC GOJ, encl 20 was not struck out as it was filed in English but because there was no translation filed within two weeks or such extended period as the court may allow. In other words, the Appellant did not fall within the proviso to O 92 r 1(4) of the RC 2012.

[15] We found no merit in the appeal premised on O 92 r 1 (1) and (4) of the RC 2012 coupled with the Registrar's Circular being administrative in nature. The aforesaid O 92 r 1(1) and (4) provide as follows:

> 1. Language of documents (O 92, r 1)
>
> (1) Subject to paragraph (2), any document required for use in pursuance of these Rules shall be in the national language and may be accompanied by a translation thereof in the English language, except that the translation for the purpose of Order 11, rule 6(4) and rule 7(1) shall be prepared in accordance with rule 6(5) of that Order.
>
> ...
>
> (4) In cases of urgency, proceedings may be commenced or conducted partly in the English language or wholly in the English language provided that —
>
> (a) a certificate of urgency explaining the urgency of the matter is filed by the solicitor; and
>
> (b) copies of all such documents in the national language shall be filed within two weeks or within such extended period as the Court may allow:
>
> Provided that:

A

(a) any document in the national language may be used as an exhibit, with or without a translation thereof in the English language; and

(b) any document in the English language may be used as an exhibit, with or without a translation thereof in the national language.

B

[16] We are of the respectful considered opinion that O 92 r 1(1) is clear that any documents for use in pursuance of RC 2012 shall be in the national language. We would need to cross refer to r 3 of the Divorce and Matrimonial Proceedings Rules 1980 which provided that the Rules of the High Court 1980 C shall apply to the practice and procedure in matrimonial proceedings in the High Court. With the repeal of the Rules of the High Court 1980, O 94 r 3(3) of the RC 2012 provided that all references to the Rules of High Court 1980 in any written law shall, on the coming into operation of RC 2012, be construed as references to RC 2012. This would mean that O 92 r 1(1) on the language D of documents being in the national language would equally apply to matrimonial proceedings.

[17] The exception to this requirement would be the proviso in O 92 r 1(4) where the matrimonial proceedings can commence or be conducted partly in E English provided there is a certificate of urgency and copies of the documents in the national language shall be filed within two weeks or such extended period as the court may allow. In the instant appeal, it is not disputed the husband did not fall within the exception.

F

[18] In fact, the position of the husband was that there is no requirement to file encl 20, or for that matter, any of its application, in Bahasa Malaysia. Heavy reliance was placed on the Registrar's Circular which provides as follows:

G

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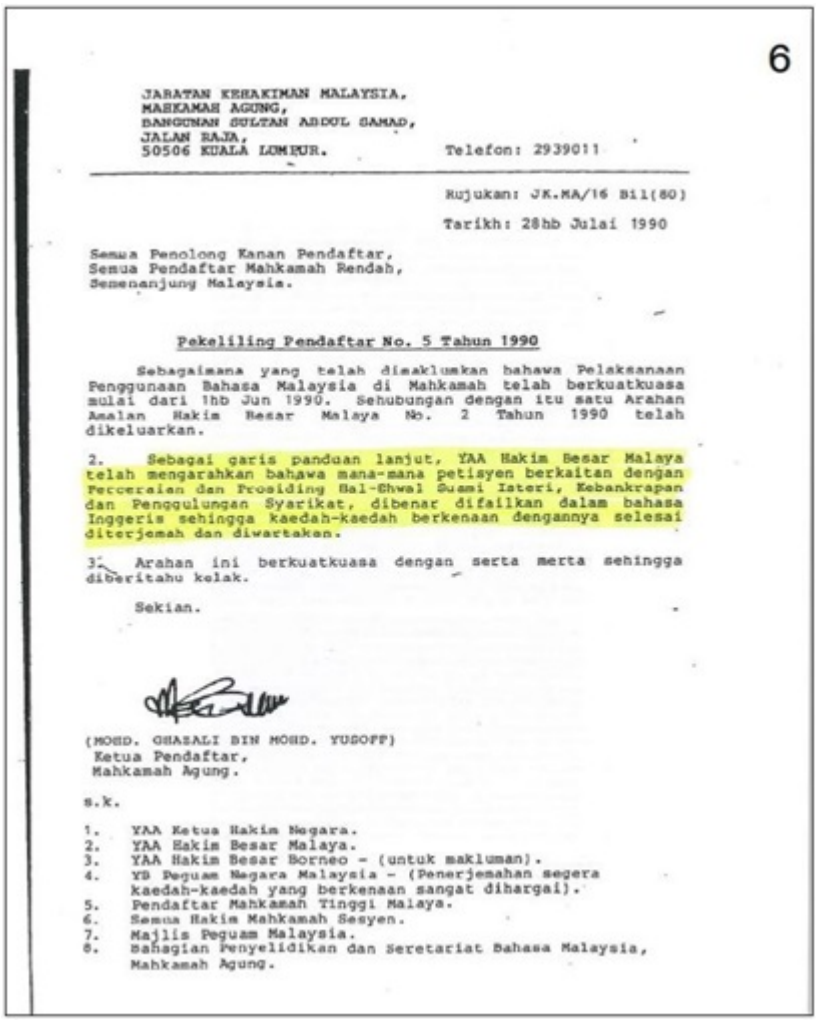
H

I



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JABATAN KEHAKIMAN MALAYSIA,
MAHKAMAH AGUNG,
BANGUNAN SULTAN ABDUL SAMAD,
JALAN RAJA,
50506 KUALA LUMPUR. Telefon: 2939011

Rujukan: JK.MA/16 Bil(80)

Tarikh: 28hb Julai 1990

Semua Penolong Kanan Pendaftar,
Semua Pendaftar Mahkamah Rendah,
Semenanjung Malaysia.

Pekeliling Pendaftar No. 5 Tahun 1990

Sebagaimana yang telah disaklumkan bahawa Pelaksanaan Penggunaan Bahasa Malaysia di Mahkamah telah berkuatkuasa mulai dari 1hb Jun 1990. Sehubungan dengan itu satu Arahan Amalan Hakim Besar Malaya No. 2 Tahun 1990 telah dikeluarkan.

2. Sebagai garis panduan lanjut, YAA Hakim Besar Malaya telah mengarahkan bahawa mana-mana petisyen berkaitan dengan Perceraian dan Prosiding Hal-Ehwal Suami Isteri, Kebankrapan dan Penggulungan Syarikat, dibenar difailkan dalam bahasa Inggeris sehingga kaedah-kaedah berkenaan dengannya selesai diterjemah dan diwartakan.

3. Arahan ini berkuatkuasa dengan serta merta sehingga diberitahu kelak.

Sekian.

(MOHD. GHAZALI BIN MOHD. YUSOFF)
Ketua Pendaftar,
Mahkamah Agung.

s.k.

1. YAA Ketua Hakim Negara.
2. YAA Hakim Besar Malaya.
3. YAA Hakim Besar Borneo - (untuk makluman).
4. YB Peguam Negara Malaysia - (Penerjemahan segera kaedah-kaedah yang berkenaan sangat dihargai).
5. Pendaftar Mahkamah Tinggi Malaya.
6. Semua Hakim Mahkamah Sesyen.
7. Majlis Peguam Malaysia.
8. Bahagian Penyelidikan dan Seretariat Bahasa Malaysia, Mahkamah Agung.

[19] Reference was also made to a Bar Council Circular No 153/2019 dated 6 August 2019 (BC Circular) which is as follows:

Bar Malaysia
Malaysian Bar

www.malaysianbar.org.my

15 Leboh Pasar Besar
50050 Kuala Lumpur, Malaysia
Tel : +603-2050 2050
Fax : +603-2026 1313, 2034 2825, 2072 5816
Email : council@malaysianbar.org.my

Circular No 153/2019
Dated 6 Aug 2019

To Members of the Malaysian Bar

Filing of Documents in English for Family Law Matters

Following a recent meeting between the Bar Council Family Law Committee and the Managing Judge of the High Court, YA Datuk Hasnah binti Dato' Mohammed Hashim, the Managing Judge recently confirmed that the Registrar's Circular No 5 of 1990 (Pekeliling Pendaftar No 5 Tahun 1990), which is dated 28 July 1990 and accessible here, remains valid, as far as matrimonial proceedings are concerned.

As the Bahasa Malaysia translation of the Divorce and Matrimonial Proceedings Rules 1980 has yet to be gazetted, all cause papers may be filed in English.

Thank you.

Salim Bashir
Secretary
Malaysian Bar

[20] In essence, the submission was that the Registrar's Circular meant that cause papers for matrimonial proceedings could be filed in English as the Bahasa Malaysia translation of the Divorce and Matrimonial Proceedings Rules 1980 had yet to be *gazetted*. The fact of there being no such Bahasa Malaysia translation, is also undisputed.

[21] The above submission was without merit as the Registrar's Circular is at best administrative in nature. For such a proposition, we take guidance from the Supreme Court in *Ooi Bee Tat v Tan Ah Chim & Sons Sdn Bhd & Anor and another appeal* [1995] 3 MLJ 465 that:

> ... Practice directions are intended to be no more than a direction for administrative purpose ...

[22] The Federal Court in *Megat Najmuddin bin Dato Seri (Dr) Megat Khas v Bank Bumiputra (M) Bhd* [2002] 1 MLJ 385 speaking through Steve Shim CJSS had this to say at pp 403–404:

> From the contents therein, it can be seen that the said practice direction deals specifically with documents falling under r 18(4)(d) of the RCA. The parts underscored are significant for our purpose. The first part provides that as soon as the appellant receives the sealed order from the High Court, it can be filed as a supplementary record of appeal without any application. The second part provides an alternative requirement, ie that the appellant is allowed to tender a copy of the judgment, decree or order appealed from on the day of the hearing of the appeal in open court
>
> ...
>
> It is true that the Chief Justice has been empowered under r 110 of the RFC to issue practice directions. So has the President of the Court of Appeal under r 77 of the RCA. Nevertheless, it cannot have been in the contemplation of Parliament that they can issue practice directions in direct conflict with procedural rules of court which have been statutorily laid down. In my view, to the extent that such practice directions are in conflict, in the sense of superceding or deviating substantially from statutory rules of court, they are of no legal effect whatsoever. Of course, once practice directions have been properly and legally issued, they must be complied with. I believe that to be trite (see *Yeo Yoo Teik v Jemaah Pengadilan Sewa, Pulau Pinang & Anor* [1996] 2 MLJ 54; *Raja Guppal a/l Ramasamy v Sagaran a/l Pakian* [1999] 2 MLJ 677).

[23] The Registrar's Circular cannot therefore depart from the language requirement as clearly stated in O 92 r 1(1) of the RC 2012. To echo the words of Steve Shim CJSS in *Megat Najmuddin*, 'to the extent that such directions are in conflict, in the sense of superseding or deviating substantially from statutory rules of court, they are of no legal effect whatsoever'.

[24] Reliance was also placed on a Federal Court case of *Lau Keen Fai v Lim Ban Kay @ Lim Chiam Boon & Anor* [2012] 2 MLJ 8 for the proposition that the Registrar's Circular being a specific and special provision for divorce and matrimonial proceedings would exclude the general provision of a general law as set out in O 92 r 1(1) of the RC 2012. At p 15, this was said:

> [13] It is also to be noted the provision of s 96(a) of the CJA is a provision regulating civil appeals in general to the Federal Court. The LPA is an Act relating to the legal profession in Malaysia, specifically to regulate the legal profession. The maxim *generalia specialibus non derogant* is applicable here which states, inter alia, that where a special provision is made in a statute as in s 103E of the LPA that special provision excludes the operation of a general provision in the general law (see the case of *Director of Customs, Federal Territory v Ler Cheng Chye (liquidator of Castwell Sdn Bhd, in liquidation)* [1995] 2 MLJ 600).
>
> (Note: LPA refers to the Legal Profession Act 1976.)

[25] *Lau Keen Fai* can be easily distinguished where in that case there were two specific Acts of Parliament. In our instant appeal, we have on the one hand O 92 r 1(1) of the RC 2012 which is statutorily enacted as against the Registrar's Circular which is administrative in nature. Although the Registrar's Circular may be specific, it cannot be elevated to a rule which overrides O 92 r 1(1).

[26] The significance of the use of the national language in court proceedings was underscored in *Dato Seri Anwar bin Ibrahim* referring to *Zainun bte Hj Dahlan*. Refer to pp 58 and 59 where this Court in dealing with a memorandum of appeal filed in English categorically rejected it, without further ado, where the law required it to be the national language. It was stated resoundingly that 'What is mandatory, must be adhered to'. We refer to p 58 as follows:

> [50] We categorically say that the mandatory provisions of art 152 of the Federal Constitution read together with s 8 of the National Language Acts 1963/67 (Act 32) and s 3 of the Interpretation Acts 1948 and 1967 (Act 388) must be adhered to. It requires the appellant to file the memorandum of appeal in the national language. No other language will be entertained. And the failure of the appellant to do so amounts to a blatant breach which would compel us to conclude that no memorandum of appeal has been filed at all. The purported memorandum of appeal in the English language must accordingly be rejected outright without further ado. What is mandatory, must be strictly adhered to. Otherwise dire consequences would follow.'

[27] Likewise, in our instant appeal, as we find that the Registrar's Circular is administrative in nature, it cannot possibly prevail over O 92 r 1(1) of the RC 2012 which requires court documents to be in the national language. Further the proviso in O 92 r 1(4) could not assist the husband. Under the circumstances and despite the court being informed that the filing of cause papers in English is common in the High Court of Penang and Kuala Lumpur, we find that the HC was not plainly wrong in striking out encl 20.

[28] We note that, and it is not disputed that the ex parte injunction order dated 24 January 2022 was not served on the husband within seven days and also not within the 21 days validity period. An inter parte hearing date was also not fixed within 14 days. For all intent and purpose, the ex parte order had already expired by the time encl 20 was filed on 24 March 2022 to set it aside.

CONCLUSION

[29] For the above reasons, the appeal was dismissed with no order as to costs.

Appeal dismissed with no order as to costs.

Reported by Ahmad Ismail